Office-Supreme Court, U.S.
FILED
DEC 27 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 697

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

ALEXANDER H. HADDEN,
DWIGHT B. BUSS,
Union Commerce Bldg.,
Cleveland, Ohio,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

TABLE OF CONTENTS.

Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Statutes Involved	2
Statement of the Case	3
A. The Facts	3
The Location of the Accident	3
The Sidetrack Agreement	5
The Maintenance of Track No. 3	5
Prior Use of the Sidetrack	6
The Derailment	6
The Cause of the Derailment	7
B. The Issues Framed by the Pleadings	7
C. The Issues Submitted to the Jury	8
The Jury's Verdict	9
D. The Requested Charge on Income Tax	10
Reasons for Granting the Writ	11
A. The Issue of Imputed Negligence (Question No. 1)	11
1. The Decisions of the Courts Below Are in Direct Conflict With a Decision of This Court	11
2. Conflicts Between Decisions of the Courts of Appeals	16
The Third Circuit Decisions	16
The Seventh Circuit Decisions	17
First Circuit Decision	18
Other Possible Conflicts	18

3. The So-Called "Policy" Question 19

B. The Income Tax Charge (Question No. 2) 21

Appendices:

A. Opinion of the United States Court of Appeals For the Sixth Circuit 25

B. Judgment 38

C. Statutes 39

D. Defendant's Requested Special Instruction 43

E. Special Interrogatories Requested by Defendant to be Submitted to the Jury 45

TABLE OF AUTHORITIES.

Cases.

Anderson v. United Air Lines, 183 F. Supp. 97 (S. D. Cal. 1960) 24

Bailey v. Central Vermont Ry. Co., 319 U. S. 350 (1943) 18

Baltimore and Ohio Railroad Co. v. Alpha Portland Cement Company, 218 F. 2d 207 (C. A. 3d, 1955) 16, 17

Boston & Maine R. Co. v. Hall, 284 F. 2d 474 (C. A. 1st, 1960), cert. den. 365 U. S. 817 18

Briggs v. Chicago Great Western Ry. Co., 248 Minn. 418, 80 N. W. 2d 675 (1957) 22

Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949) 23

Chicago, Great Western Ry. Co. v. Casura, 234 F. 2d 441 (C. A. 8th, 1956) 18

Cleveland C. C. & St. L. R. Co. v. U. S., 275 U. S. 404 (1928) 14

Dempsey v. Thompson, 363 Mo. 339, 251 S. W. 2d 42 (1942) 22, 24

Dice v. Akron, Canton & Youngstown R. R. Co., 342 U. S. 359 (1952) 22

Kaminski v. Chicago River and Indiana Ry. Co., 200 F. 2d 1 (C. A. 7, 1952) 17

Kennedy v. Pennsylvania Railroad Co., 169 F. Supp. 406 (W. D. Pa., 1959) reversed 282 F. 2d 705 (C. A. 3d, 1960) 16, 17

Maus v. New York, Chicago and St. Louis R. Co., 165 Ohio St. 281, 135 N. E. 2d 253 (1953) 22

McWeeney v. New York, New Haven & Hartford R. R. Co., 282 F. 2d 34 (C. A. 2d, 1960) dissenting opinion); cert. den. 364 U. S. 870 (1960) 22, 24

Rogers v. Missouri Pacific R. Co., 352 U. S. 500 (1957) 21

Sano v. Pennsylvania R. Co., 282 F. 2d 936 (C. A. 3d, 1960) 18

Shenker v. Baltimore and Ohio R. Co., 303 F. 2d 596 (1962) 16, 19

Simpson v. Texas & N. O. R. Co., 297 F. 2nd 660 (C. A. 5th, 1962). 20

Sinkler v. Missouri Pac. R. Co., 356 U. S. 326 (1958) 12, 20

Spinello v. New York, C. & St. L. R. Co., 173 Ohio St. 324 181 N. E. 2d 884 (1962) 20

Tiller v. Atlantic Coast Line Co., 318 U. S. 54 (1943) 18

Wagner v. Illinois Central R. R. Co., 7 Ill. App. 445, 129 N. E. 2d 771 (1955) 22

Ward v. Atlantic Coast Line R. Co., 362 U. S. 396 (1960) 12, 13, 14, 15, 19, 20, 21

Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F. 2nd 302 (C. A. 7, 1952), subsequent appeal reported in 204 F. 2d 755 (1953), cert. den. 346 U. S. 867, reh. den. 346 U. S. 928 17

Statutes.

Federal Employers' Liability Act:
Sec. 1 (45 U. S. C. 51) 2, 11, 13, 18, 39
Sec. 6 (45 U. S. C. 56) 1

Interstate Commerce Act, Sec. 1(9) (49 U. S. C. 1(9)) 2, 14, 40

26 U. S. C. 104(a)(2) 3, 42

28 U. S. C. 1254(1) 1

West Virginia Code, 1955, Sec. 2563 ..... 2, 14, 41

Articles.

Morris and Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A. B. A. Journal 274 (1960) 24

Roettger, *The Cautionary Instruction in Income Taxes in Negligence Actions*, 18 Wash. & Lee L. Rev. 1 (1961) 24

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on October 31, 1962.

OPINIONS BELOW.

The trial court rendered no opinion. At this writing, the majority and dissenting opinions filed in the Sixth Circuit Court of Appeals have not yet been published in the Federal Reporter but are printed as Appendix A to the present petition. The judgment of the Court of Appeals is attached hereto as Appendix B.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 31, 1962. The judgment of this Court is invoked under 28 U. S. C. § 1254(1). The jurisdiction of the trial court was invoked under Section 6 of the Federal Employers' Liability Act, 45 U. S. C. § 56.

QUESTIONS PRESENTED FOR REVIEW.

1. In a wrongful death action under the Federal Employers' Liability Act, where it is uncontradicted (1) that decedent was killed in the derailment of a switching movement caused by an obstruction upon a sidetrack; (2) that the sidetrack was a dead end track privately owned by an industry and used to service it alone; (3) that the derailment was caused by the industry's negligent violation of a specific duty imposed upon it by contract with defendant railroad to maintain the sidetrack free of dangerous obstructions; and (4) that unless arising by operation of law from such contract to maintain, no agency relationship existed between the industry and defendant railroad, is plaintiff entitled to an instruction requiring the jury to impute the admitted negligence of the industry to the railroad and to return a verdict against the latter solely on that ground, even though the jury might have found defendant itself to be free of any negligence?

2. Where in such case the jury finds plaintiff to have sustained damages in the amount of $156,629 as the result of the death of her decedent, was defendant entitled as a matter of law to an instruction that any award made to plaintiff would not be income to her under the federal income tax law?

STATUTES INVOLVED.

The federal statute involved in the decision of Question 1 is the Federal Employers' Liability Act, particularly Section 1 thereof, 45 U. S. C. § 51.

Question 1 also involves Section 1 (9) of the Interstate Commerce Act, 49 U. S. C. § 1 (9), and Section 2563 of the West Virginia Code, 1955.

The determination of Question 2 involves consideration of 26 U. S. C. § 104(a)(2).

All of the foregoing federal and state statutes are set forth in full in Appendix C of this petition.

STATEMENT OF THE CASE.

Petitioner, The Baltimore and Ohio Railroad Company, seeks review of the judgment of the Sixth Circuit Court of Appeals which, in a split decision, affirmed a verdict and judgment for respondent in the amount of $136,267.23 entered on December 2, 1960, by the District Court for the Northern District of Ohio, Eastern Division, Chief Judge James C. Connell presiding. Respondent is the surviving spouse and administratrix of the estate of Ralph T. Payne, who was killed on July 2, 1959, in the course of his employment as a B&O freight brakeman switching an industrial track.

The circumstances of this unfortunate occurrence are simple enough, and to the extent involved in this petition, undisputed. Thus, though petitioner is filing herewith ten copies of the record as printed for the court below, references thereto ("R. a") will be supplied only to the extent necessary to a clear understanding of the legal questions presented.

A. The Facts.

The Location of the Accident. The accident in which plaintiff was killed took place on the premises of Standard Ultramarine & Color Co. (hereinafter called "SUCO"), manufacturers of chemicals and dyestuffs in Huntington, West Virginia. The evidence showed that the SUCO plant was located to the north of and alongside petitioner's right of way, which extended in a generally east-west di-

rection. The plant was surrounded by a high hurricane-type steel fence, and consisted of many different buildings, tanks, and other specialized industrial structures which were separated from one another by alleyways, driveways, and loading areas.

For many years prior to the accident, SUCO had received railroad freight service by means of a spur track or siding, known as Track No. 3, on which petitioner's switching movement was traveling when it derailed. Track No. 3 commenced at a switch on petitioner's right of way, passed through a gate in the plant fence and thence extended into the plant in a generally northwesterly direction, curving first to the right and then to the left until it finally dead ended between two of SUCO's buildings 995 feet from the gate.

On the south side of track No. 3 about 150 feet inside the gate was a boiler house in which were located the boilers and machinery employed by SUCO to heat and operate its plant. The boilers were fired by coal, the ash residue from which was disposed of by means of a forced air or vacuum system which transported them through pipes to an overhead ash silo located directly over track No. 3. The silo was a large circular structure some 10 to 12 feet in diameter situated on stilts 12 to 15 feet above the track, just high enough to clear railroad boxcars. Although the silo had obviously been designed so that ashes could be unloaded from it into railroad cars, it was never used in that fashion. Instead, the ashes were hauled from the plant in the dump trucks of independent contractors who delivered SUCO's coal requirements. After unloading their coal and as the ash supply might require, the trucks would drive onto the tracks beneath the silo, where ashes would be loaded into them by SUCO's employees through a chute lowered from the silo into the dump body.

The Sidetrack Agreement. It was undisputed that track No. 3 had existed in substantially unaltered form for many years, and that its use during that period by both SUCO and the petitioner had remained substantially identical. There was no testimony as to when the track was built, but it was established that SUCO and petitioner had entered into a sidetrack agreement on June 12, 1948, which was continuously in effect until the accident of July 2, 1959. Pertinent extracts from the agreement were introduced in evidence as Plaintiff's Exhibit 23 and read to the jury. (R. 120a-122a.) Under the terms of the agreement, the portion of track No. 3 outside the fence and gate was owned and maintained by the railroad while all portions on SUCO's property inside the fence, including the site of the derailment, were owned and maintained by SUCO. By the terms of paragraph 7, SUCO specifically agreed not to "erect or place or allow to be erected or placed, or to remain, on its premises any obstruction or materials of any kind in dangerous proximity to the siding."

The Maintenance of Track No. 3. Pursuant to the responsibilities assumed by it under the sidetrack agreement, SUCO maintained a yard gang, a part of the duties of which was to inspect the track and keep it clean and free of obstructions, and there was evidence from which the jury could have concluded that SUCO's housekeeping procedures had been sufficiently effective that in their many years of experience switching the track, no train crew had ever before found the track obstructed during the nighttime hours when the plant was not in operation. (See, *e.g.*, R. 195a.) Consistent with the agreement, and in accordance with its system-wide practice with regard to private sidetracks, the railroad limited its inspection of track No. 3 to a monthly track patrol by the local section fore-

man to check the condition of the rails and ties and the gauge of the track. (See, *e.g.*, R. 65a.) Occasionally, however, other railroad employees whose duties took them to the track during the day had asked SUCO to correct unsafe track conditions noted in the plant and these requests had always had prompt attention. (R 146a-147a.)

Prior Use of the Sidetrack. It was uncontradicted at trial that track No. 3 was entirely private in nature and had never been used by the railroad except to serve SUCO. Although the railroad was empowered under paragraph 8 to use the track for "general railroad purposes," there was no proof that it had ever done so.

The Derailment. As day was breaking on July 2, 1959, a railroad crew of which decedent Payne was a member entered the SUCO plant to perform a switching movement on track No. 3. It was the crew's intention to shove three cars into track No. 3 with an empty boxcar leading the movement, couple into a loaded car located beyond the point of the derailment, remove the loaded car, and then return to spot the boxcar. The movement proceeded without incident until the leading boxcar reached a point directly beneath the ash silo. In accordance with normal railroad practice, decedent Payne was riding on the side ladder on the southwest corner of the leading car, maintaining a lookout ahead. He carried a switchman's lantern, visible to other members of his crew, for the purpose of initiating signals to be relayed to the engineer. As the car passed beneath the stilts of the ash silo, its lead truck encountered a large pile of ashes located directly beneath the chute of the silo. Since the car was empty, its weight was not sufficient for the wheels to cut through the ashes, and they were lifted off the rail, with the result that the car refused the right-hand curve, ultimately colliding with the side of the boiler house.

Payne was crushed and instantly killed. No member of the crew was aware that the car had derailed until it made contact with the building.

The Cause of the Derailment. Normally the loading area beneath the silo at the point of derailment consisted of sufficient ash fill to cover the ties and bring the level between and outside the rails to approximately the height of the top of the rail, thus affording ready access for the dump trucks to the area under the chute. While there was some variation in the testimony concerning the usual level of the fill, there was ample evidence from which the jury could have concluded that on the morning of the derailment it was piled four to six inches deeper than ever before over an area six or eight feet in diameter directly under the chute of the silo. It was undisputed that no railroad employee had had anything to do with placing the ashes there. On the contrary, as stated by Judge O'Sullivan in the dissenting opinion below, "there was evidence from which the jury could find that the ash accumulation which caused the derailment was the result of a single and unusual act of negligence by SUCO and that the railroad had not had reasonable opportunity to discover it and require its removal." (App. A, *infra*.)

B. The Issues Framed by the Pleadings.

Respondent charged in her complaint (R. 4a) that petitioner had negligently sent her decedent onto track No. 3 although "it was and for a long time had been so fouled and choked with cinders, ashes, waste and debris that there was a serious risk of derailment and injury." Respondent further charged that the track "did not constitute a reasonably safe place about which to work by reason of its layout, its close clearances, its fouled and clogged condition." In spite of the reference to "close clearances,"

respondent made no claim of negligence in this respect. On the contrary, by answers to interrogatories read to the jury (R. 277a), respondent affirmatively disclaimed any such theory of recovery, and averred that the sole cause of the derailment was "a dirty, fouled track," and that she "does not know of any contributing causes." (R. 8a-9a.)

The charges of negligence set forth in respondent's complaint were denied in petitioner's answer, in which it was affirmatively alleged that the derailment was caused by the negligence of SUCO in causing and permitting the sidetrack owned and maintained by it to become fouled, and by the negligence of Payne himself in failing to discover the ashes in time to signal a stop and avoid the accident. (R. 5a-6a.)

C. The Issues Submitted to the Jury.

At the conclusion of the evidence, petitioner submitted a special instruction, set forth in full in Appendix D, which it requested be given to the jury. If given, it would have informed the jury that the railroad owed decedent a continuing and non-delegable duty to employ reasonable care to furnish him a safe place to work; that in determining whether the railroad discharged this duty, they should consider all of the evidence tending to indicate the extent, if any, to which the railroad was justified in the exercise of ordinary care in relying upon SUCO to maintain the track in a safe operating condition; that no plaintiff's verdict could be returned, however, simply because of SUCO's negligence; and that such negligence could be made the basis for a plaintiff's verdict only if the railroad failed to act after being placed upon notice that SUCO would fail to keep the track in a safe operating condition.

Petitioner also submitted special interrogatories, attached hereto as Appendix E, which is requested be answered by the jury. If answered, the interrogatories would have permitted the parties and the court to determine exactly what negligence, if any, the jury found against SUCO, petitioner, and the decedent, respectively.

The trial court, however, refused both the instruction and the special interrogatories submitted by petitioner. Instead, the court submitted the following issues, among others, for determination by the jury: (1) whether SUCO was guilty of any negligence in respect of the dangerous accumulation of ashes, *in which event the jury was instructed that such negligence should be imputed to petitioner* (R. 280a); and (2) whether petitioner was guilty of any negligence independent of that of SUCO (R. 282a, next to last paragraph; R. 285a, last paragraph; R. 287a, second full paragraph). Of course, as noted in Judge O'Sullivan's dissent, the submission of the first of the above issues was tantamount to the direction of a verdict in favor of respondent, since, as already noted, the negligence of SUCO had been pleaded or admitted by both parties.

The Jury's Verdict. Instead of petitioner's 8 special interrogatories, the court chose to submit two substitute questions (R. 291a) which required the jury to state the respective percentages of the combined negligence of SUCO and petitioner, on the one hand, and of decedent on the other. No questions were submitted inquiring whether petitioner was guilty of any negligence independent of that of SUCO or if so, of what such negligence consisted.

In its answers, the jury found SUCO and petitioner together guilty of 87% of the total negligence, and decedent guilty of the remaining 13%, and that total dam-

ages of $156,629 had been sustained by respondent. This figure was then reduced by the court by the latter percentage to $136,267.23, the amount of the judgment appealed from.

Because of the trial court's refusal to submit petitioner's special interrogatories, it is now impossible to determine whether the 87% of the total negligence for which the jury found SUCO and petitioner together responsible consisted entirely of the pleaded and admitted negligence of SUCO, or in part also of petitioner's independent negligence. Thus, if petitioner is entitled to relief, a new trial must follow in which petitioner's requested instruction and special interrogatories should in substance both be given to the jury.

It should be emphasized here that the present petition does *not* question the sufficiency of the evidence of petitioner's independent negligence to take the case to the jury. Thus, the entry of final judgment for petitioner would not be appropriate and is not here sought.

D. The Requested Charge on Income Tax.

At the close of all the evidence, petitioner requested the following charge, which the court declined to give:

> "I charge you as a matter of law that any award made to Plaintiff in this case, if any is made, is not income to the Plaintiff within the meaning of the Federal Income Tax Law. Should you find that Plaintiff is entitled to an award of damages, then you are to follow the instructions already given by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal Income Taxes." (R. 280a.)

In view of the magnitude of the jury's special finding of damages ($156,629), it is apparent that the failure to give

this charge, if erroneous, was prejudicial. Petitioner therefore asserts the failure to give the requested charge as an independent ground for a new trial and requests this Court, by granting this petition, to set at rest this important and controversial question, necessarily involved in every FELA action.

REASONS FOR GRANTING THE WRIT.

A. THE ISSUE OF IMPUTED NEGLIGENCE (QUESTION NO. 1).

1. The Decisions of the Courts Below Are in Direct Conflict With a Decision of This Court.

Respondent's wrongful death action was brought under the Federal Employers' Liability Act, 45 U. S. C. §§ 51-60, as amended, particularly Section 1 of the Act, which provides in pertinent part as follows:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * *, or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of *any of the officers, agents or employees of such carrier*, or by reason of any defect or insufficiency, due to *its* negligence, in *its* * * * track, roadbed * * * or other equipment." (Emphasis supplied; 45 U. S. C. § 51.)

A reading of Section 1 makes it apparent that the trial court's charge on imputed negligence was legally proper if, and only if, the employees of SUCO were the "agents" of the railroad within its meaning, for no contention was made that the derailment was caused by a "defect or insufficiency" in "its [*i.e.*, petitioner's] track [or] roadbed." Moreover, under the evidence SUCO was clearly an independent contractor as to the railroad in any conventional

sense, since their only relationship apart from the side-track agreement was that of shipper and carrier. The relationship of agency can arise, therefore, only from a definition of "agent" peculiar to the FELA.

This Court has decided two cases within the last five years which together resolve any doubt as to whether SUCO's employees were the "agents" of petitioner under the facts of this case. *Sinkler v. Missouri Pac. R. Co.*, 356 U. S. 326 (1958); *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396 (1960). In *Sinkler*, plaintiff was a cook employed on the private car of the railroad's general manager. He brought action for injuries resulting from negligent switching of the car by employees of an independent belt railway which had contracted with the defendant to perform switching operations for it in the vicinity of Houston, Texas. The issue before the Court, as stated by Justice Brennan in the majority opinion, was identical to that presented in the instant case:

> "* * * No question of liability for the fault of officers or employees of the respondent is here raised, but only whether the petitioner's injuries were due to the fault of 'agents' of the respondent within the meaning of [Section 1 of the Act]." (356 U. S. at 328.)

In the light of common law precedents and the remedial nature of the FELA, the court held that the proper test of "agency" was whether or not those whose negligence was responsible for the injuries were "engaged in the common endeavor," and giving their labor "to the furtherance of the enterprise" of rail transportation. Thus, the Court concluded that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, *operational activities* of his em-

ployer, such others are 'agents' of the employer within the meaning of § 1 of the FELA." (Emphasis supplied; 356 U. S. at 331-2.) In ruling that the belt line *was* the railroad's agent under this test, the court expressly recognized that it had given "accommodating scope" to the word "agents." (*Id.* 331.)

The same question was again presented to this Court in the *Ward* case, *supra*, in which an FELA plaintiff had been injured while working on the private sidetrack of a turpentine company. Although the jury could have found that plaintiff was off duty at the time of his injury and therefore not an "employee" of the railroad within the meaning of the Act, he contended that he was actually under railroad supervision and therefore entitled to its benefits. He also contended that he had been furnished insufficient help to lift heavy cross-ties, and that he was not promptly furnished medical attention after he was injured. See pp. 1-2 of Record, *Ward v. A. C. L. R. Co.* Obviously, there could be no recovery for the turpentine company's negligence in these respects unless it were an "agent" of the railroad in maintaining the sidetrack. Thus, plaintiff argued not only that he remained a railroad employee but also that the turpentine company was the railroad's agent under § 1 of the Act. (See pp. 19 *et seq.*, 26 *et seq.* of Brief of Petitioner in *Ward* case.)

In the Court's *per curiam* opinion, eight justices concurred as follows in deciding the agency question:

> "The petitioner contends that the proofs require a holding as a matter of law that the Turpentine Company, in the maintenance of the siding, was the 'agent' of the respondent railroad within the meaning of § 1 of the Federal Employers' Liability Act, 45 U. S. C. § 51, as we construed that term in *Sinkler v.*

Missouri Pacific R. Co., *supra*. We find no merit in this contention. *Indeed, we do not think that the proofs presented a jury question whether the Turpentine Company was the railroad's 'agent' within the meaning of the Act.* This was not a situation, as in Sinkler, in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise. *This was a siding privately owned by the Turpentine Company and established to service it alone. In maintaining it, we do not see how it can be said under the proofs that the Turpentine Company was 'engaged in furthering the operational activities of respondent.' Sinkler v. Missouri Pacific R. Co., supra*, at 331." (362 U. S. at 397-8; emphasis supplied.)

It should be noted in passing that though not cited by the Court, this conclusion is both consistent with, and legally required by, Section 1(9) of the Interstate Commerce Act, 49 U. S. C. § 1(9), under which a railroad's public utility responsibilities are fully discharged when it has provided a "switch connection with any * * * private sidetrack" constructed by an industry. *Cleveland C. C. & St. L. R. Co. v. U. S.*, 275 U. S. 404, 408 (1928). The same rule obtains in respect of a railroad's intrastate carrier responsibilities in West Virginia. West Virginia Code, 1955, Section 2563. Both statutes are set forth in full in Appendix C, *infra*.

Notwithstanding its holding in *Ward* in favor of the railroad on the agency question, the Court agreed with the employee, who lost in the courts below, that the trial court had erred to his prejudice in failing to give the following instruction concerning his status as an employee:

> "The accident here involved occurred on a spur track which was partly owned by the M. & M. Turpentine Co. The fact that the M. & M. Turpentine Co.

had contracted with the defendant railroad to maintain all or a portion of this spur track does not relieve the defendant railroad of its liability to the plaintiff if the plaintiff was injured during the course of his employment with the defendant railroad on the spur track as a direct consequence, in whole or in part, of the defendant railroad's negligence." (*Id.* 399, n. 1.)"

It is an inescapable corollary of the foregoing instruction that railroad liability could *not* have been predicated upon the negligence of the industry. The similarity between this instruction and the one requested by petitioner and refused by the trial court in the instant case (see App. D, *infra*) is obvious.

The Court of Appeals majority held that the charge requiring the jury to impute to petitioner the negligence of SUCO, and thus to return a verdict against petitioner even in the absence of any negligence on its part, was "proper," and it did so without any attempt to distinguish, and indeed without even a mention of, the *Ward* case which had been extensively argued and briefed for its benefit.

Respondent has argued below that there are factual distinctions between *Ward* and the present case which make the rule of the former inapplicable here. That the case is on "all fours" is abundantly demonstrated by the fact that respondent has never suggested any theory under which the present result can be reconciled with the court's explicit holding that an industry's maintenance of its own private siding is *not* an "operational activity" of the connecting railroad. Accordingly, it is inescapably clear that the decision of the court below is squarely in "conflict with applicable decisions in this Court." (Rule 19 of this Court.) For this reason, this petition for a writ of certiorari should be granted.

2. Conflicts Between Decisions of the Courts of Appeals.

The Third Circuit Decisions. As stated in the dissenting opinion of Judge O'Sullivan in the court below, the only decisions cited by respondent in support of the contention that SUCO's negligence was imputable to the railroad were *Baltimore and Ohio Railroad Co. v. Alpha Portland Cement Company*, 218 F. 2d 207 (C. A. 3d, 1955), and *Kennedy v. Pennsylvania Railroad Co.*, 169 F. Supp. 406 (W. D. Pa., 1959), reversed 282 F. 2d 705 (C. A. 3d, 1960). While the *Kennedy* case does contain dictum from which it may be inferred that under appropriate facts the Third Circuit would perhaps approve the charge given in the instant case, and though the *Alpha* case, while less clear, may perhaps also support such a view, the actual decisions, as Judge O'Sullivan pointed out, are not direct authority for the trial court's imputed negligence charge, since in neither of them was such a charge given. Instead, at the appellate level both cases involved the railroads' rights of indemnity against the side track owners on whose premises the accidents occurred. Thus the present case is one of first impression so far as the charge on imputed negligence is concerned.

The Third Circuit's position is further complicated by its decision in *Shenker v. Baltimore and Ohio R. Co.*, 303 F. 2d 596 (1962), now pending in this Court following the granting on November 19, 1962, of plaintiff's petition for certiorari. In that case, Shenker sued the B&O for injuries sustained when he attempted to pass a mail bag through the door of a Pittsburgh & Lake Erie Railroad baggage car. The door stuck, and in attempting to maneuver the bag through the narrowed opening, he wrenched his back. The trial court charged the jury that the P&LE's negligence "was the negligence of the plaintiff's employer,

B&O, as a matter of law." (303 F. 2d at 598.) The Court of Appeals reversed the judgment for plaintiff, holding that there was "no basis whatever for attributing any negligence on the part of P&LE to the plaintiff's employer." (*Ibid.*) Judge Kalodner filed a dissenting opinion, cited by the Sixth Circuit majority below, and four judges (Biggs, Kalodner, Staley, and Smith) dissenting from the court's denial of a motion for rehearing. Thus, there is something less than complete unanimity of opinion in the Third Circuit as to the correctness of the ruling. However, if the *Shenker* decision is correct, as petitioner firmly believes it to be, it is in direct conflict with the Sixth Circuit's decision in this case, and possibly also with the *Alpha* and *Kennedy* cases, above cited.

The Seventh Circuit Decisions. The majority opinion below is also in plain and irreconcilable conflict with two decisions of the Seventh Circuit Court of Appeals. *Kaminski v. Chicago River and Indiana Ry. Co.*, 200 F. 2d 1 (C. A. 7, 1952); *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.*, 191 F. 2nd 302 (C. A. 7, 1952), subsequent appeal reported in 204 F. 2d 755 (1953), cert. den. 346 U. S. 867, reh. den. 346 U. S. 928. In the *Kaminski* case, plaintiff car checker was injured when he fell into an unused coal pit on an industry's sidetrack which had unexpectedly been uncovered without notice to the railroad. In *Wetherbee*, factually very similar to the present case, plaintiff's decedent was killed when crushed between a box car and building as the result of the car's being derailed by a five-foot long piece of wood left in the flangeway of an industrial sidetrack, presumably by one of the industry's truck drivers. In both cases, the Seventh Circuit Court of Appeals reversed judgment for the employee and entered final judgment for the railroad on the ground that it had received no notice of the dangerous condition. Both

cases are plainly inconsistent with railroad liability on the theory of imputed negligence.

First Circuit Decision. The First Circuit has also dealt with this question by way of dictum in *Boston & Maine R. Co. v. Hall*, 284 F. 2d 474 (C. A. 1st, 1960), cert. den. 365 U. S. 817, 818, an action for the death of a fireman killed in a train-truck collision at a private industrial grade crossing over defendant's track. The collision was caused by the negligence of the industry's crossing watchman, and plaintiff contended that the watchman was the "agent" of the railroad under Section 1 of the FELA. The court rejected this contention, saying that the use by the industry of the "private easement of crossing * * * was not in furtherance of any railroad business, and appears far removed from the direct operational assistance the railroad received from the switcher in *Sinkler*." (284 F. 2d at 477 n. 3.) No basis is apparent for distinguishing between the industry's operation of the private crossing gates in the *Hall* case and SUCO's maintenance of its private sidetrack here. The decision below is thus in conflict with the rule in the First Circuit.

Other Possible Conflicts. A word should perhaps be added concerning the other decisions of this Court and the Courts of Appeals which are cited in the majority opinion: *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943); *Tiller v. Atlantic Coast Line Co.*, 318 U. S. 54 (1943); *Sano v. Pennsylvania R. Co.*, 282 F. 2d 936 (C. A. 3d, 1960); and *Chicago, Great Western Ry. Co. v. Casura*, 234 F. 2d 441 (C. A. 8th, 1956). Since these are the only authorities cited by the court, it might be thought that they support its imputed negligence holding. On the contrary, these cases merely set forth the general proposition, on facts which are readily distinguishable, that where a

railroad is on notice of an unsafe condition, its non-delegable duty to exercise reasonable care to furnish a safe place to work is not relieved by the fact that the danger is located on the premises of an industry or because the industry was originally responsible for its creation. With this principle petitioner has no argument. But it should be added that if and to the extent that these cases are authority for the charge in the instant case, permitting and indeed *requiring* imputation of the industry's palpable and admitted negligence to the petitioner, they would also be in conflict with the Court's decision in the *Ward* case, with the cited decisions of the Seventh and First Circuits, and also with the *Shenker* case.

3. The So-Called "Policy" Question.

As the discussion above reveals, this Court's decision in *Ward v. Atlantic Coast Line R. Co., supra*, should have laid at rest once and for all the question whether a railroad can be held *vicariously* liable for industrial negligence in maintaining a private sidetrack. *Ward* held that it could not. But although the majority below was plainly unable to distinguish that case (since it is not even cited, much less distinguished), it evidently agreed with counsel for respondent, who argued below that there were "policy" considerations which would lead this Court to change its mind in the present case. Such, at least, is the apparent inference to be drawn from the following language:

> "Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty or abdicates its control, the employer takes the risk, not the employee."

Not only did the Court thus disregard the *Ward* case, but it appears to have enunciated a new and wholly unprecedented rule under which the employer assumes not merely the status of an insurer with regard to the employee but also the responsibilities of a guardian to his ward. If this rule is to become the law of the land, where is railroad liability to cease? Is a railroad, for example, to become responsible to its employee who, as a railroad messenger, is run over by a negligent automobile driver on a public street in the course of picking up mail for his employer? Or for the death of a section worker killed in an auto collision brought about by a slippery highway over which the railroad knowingly permitted him to drive? Recent decisions have held to the contrary,* but if the quoted passage from the majority opinion means what it says, the railroad would in each case be liable, since in permitting its employee to leave its premises, it effectively delegated to the public at large its "non-delegable" duty to furnish him with a safe place to work.

Plainly, no such results are tolerable under the Federal Employers' Liability Act. This Court has recognized that there *is* a point beyond which a railroad must be insulated from the negligent acts of outsiders which cause injury to its employees. *Sinkler* held that a railroad is *not* so insulated when such injury occurs through the negligence of anyone to whom the railroad has delegated any of its publicly franchised operational activities, but in *Ward* the line between operational and non-operational activities was drawn with commendable certainty at the property line between railroad and industrial premises. No reason is evident why the principle of the *Ward* decision

---

* *Spinello v. New York, C. & St. L. R. Co.*, 173 Ohio St. 324, 181 N. E. 2d 884 (1962); *Simpson v. Texas & N. O. R. Co.*, 297 F. 2nd 660 (C. A. 5th, 1962).

should so soon be abandoned, and no logically justifiable substitute for it has been suggested or is readily apparent.

Under *Ward*, no railroad employee is left without a remedy. On the contrary, not only does he have his common law right of action against the sidetrack owner whose negligence—non-imputable to the railroad—has caused his injuries, but more importantly, he has his FELA suit against the railroad and his right of jury trial "in all but the infrequent cases" where there is not the "slightest" evidence of employer negligence. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957).

A railroad's responsibilities under the FELA are onerous and inescapable. Its duty of care follows the employee wherever he goes, requiring it to respond in damages whenever he is injured by reason of any defect or danger, whether on or off its premises, of which it should have known. To saddle it now with liability for dangerous conditions of which it has no notice, negligently created by persons over whom it has no control, would constitute a departure from all prior precedent.

If this Court fails to grant the present petition to correct the error of the court below, the majority opinion of the two district judges remain a valid appellate precedent, and the confusion and uncertainty already attendant upon the trial of FELA sidetrack cases will be compounded. It follows that the writ of certiorari should issue.

B. THE INCOME TAX CHARGE (QUESTION NO. 2).

The question whether a trial court should charge a jury that an award to plaintiff is exempt from federal income taxation has been the subject of considerable conflict in federal and state court cases decided under the FELA. This conflict has extended both to whether the giving of such a charge presents a question of local or

federal law in cases decided under the FELA and to whether the giving of, or the failure to give, such a charge constitutes reversible error.

The confusing state of the present law is illustrated by the following FELA decisions. In *Dempsey v. Thompson*, 363 Mo. 339, 251 S. W. 2d 42 (1942), the Supreme Court of Missouri, assuming without discussion that the giving of such a charge was a question of *local* law, ruled that a trial court commits reversible error in refusing to charge a jury that its award to the plaintiff would be exempt from federal income taxation. On the other hand, in *McWeeney v. New York, New Haven and Hartford R. Co.*, 282 F. 2d 34 (C. A. 2d 1960), cert. den. 364 U. S. 870 (1960), the Second Circuit, sitting *en banc* and assuming without discussion that the question was one of *federal* law, ruled in a split decision that a trial court commits no reversible error in refusing to instruct a jury on the federal income tax exemption attaching to jury awards. The same result has been reached in several state court FELA cases, but in these the courts have assumed that the question was one of *local* law. See, *e.g.*, *Maus v. New York, Chicago and St. Louis R. Co.*, 165 Ohio St. 281, 135 N. E. 2d 253 (1953) and *Briggs v. Chicago Great Western Ry. Co.*, 248 Minn. 418, 80 N. W. 2d 675 (1957). Bringing the confusion full circle, the court in *Wagner v. Illinois Central R. R. Co.*, 7 Ill. App. 445, 129 N. E. 2d 771 (1955), held as a matter of local law that the *giving* of such a charge constituted reversible error.

This Court's prior decisions make it imperative that these conflicts be resolved. FELA cases involve *federal* rights which must be decided according to a uniform body of federal law, uncluttered by vagaries of local practice. *Dice v. Akron, Canton & Youngstown R. R. Co.*, 342 U. S.

359 (1952); *Brown v. Western Ry. of Alabama*, 338 U. S. 294 (1949).

Moreover, the charge requested by petitioner below (see p. 10, *supra*) is desirable from a substantive point of view. It would remove doubt and confusion from the minds of jurors, leaving them free to assess damages accurately without regard to imagined income tax consequences. It would eliminate any possibility of the jury's adding to the plaintiff's award because of a mistaken belief that the award would be subject to federal income taxation. The overwhelming majority of the commentators and judges who have considered the question have agreed with Judge O'Sullivan's reasoning in the court below that no possible harm can result to plaintiffs, and that serious prejudice to defendants can be avoided. To quote Judge O'Sullivan directly:

> "Some of the cases considering the subject merely hold that it would not be error to give a simple instruction on the point but, as plaintiff argues here, hold that the matter should be left to the trial judge's discretion. * * * I do not think we can so easily dispose of the subject. I grant, as stated above, that jurors' deliberations might be impeded if they were required, in computing past earnings and calculating loss of future earnings, to guess as to past or future tax rates and regulations. Simple advice, however, that their present award will not be reduced by income tax does not have such vice. *If, as seems to be conceded, no prejudice will be visited upon a plaintiff by such advice, why withhold it? In my opinion, serious harm can result to a defendant from jurors' lack of information in this field. They should know the truth. Except for the loss of unfair advantage, plaintiffs will not suffer from a jury knowing such truth. I consider it reversible error to refuse a simple instruction on the subject.*" (Emphasis supplied.)

See also *McWeeney v. New York, New Haven & Hartford R.R. Co.*, 282 F. 2d 34, 40 (C. A. 2d 1960; dissenting opinion); cert. den. 364 U. S. 870 (1960); *Anderson v. United Air Lines*, 183 F. Supp. 97 (S. D. Cal. 1960); *Dempsey v. Thompson, supra*; Roettger, *The Cautionary Instruction in Income Taxes in Negligence Actions*, 18 Wash. & Lee L. Rev. 1 (1961); Morris and Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A. B. A. Journal 274 (1960).

For the reasons so well expressed by Judge O'Sullivan, this Court should now hold that a state or federal court commits reversible error in refusing to charge a jury in an FELA case that an award of damages is exempt from federal income taxation. Such a ruling would resolve the irreconcilable conflict which exists in the federal and state court FELA cases which have decided the question, and would promote uniformity in the administration of the FELA. In view of the magnitude of the damages assessed in this case, and also in view of the fact that a new trial will be required if the Court rules in favor of petitioner on the first question presented (i.e., the validity of the trial court's imputed negligence charge), this case affords a particularly appropriate occasion for the Court to render such a decision.

Respectfully submitted,

ALEXANDER H. HADDEN,
DWIGHT B. BUSS,
BAKER, HOSTETLER & PATTERSON,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided October 31, 1962.)

Before: O'SULLIVAN, Circuit Judge, BOYD and THORNTON, District Judges.

THORNTON, District Judge. This is a Federal Employers' Liability Act case in which defendant, The Baltimore and Ohio Railroad Company, appeals from a verdict and judgment against it in the amount of $136,267.23, plus costs. Plaintiff is the administratrix of the estate of Ralph T. Payne whose death was caused by the accident which is the subject matter of this case.

The four questions involved in this appeal, as stated by defendant, fall into two categories. Questions I, III and IV relate to two specific instructions given to the jury by the District Judge and to one specific instruction which the District Judge refused to give. Question II relates to defendant's contention that the negligence of the industry was not imputable to defendant, and that therefore there was not sufficient evidence to take the case to the jury on the question of its own independent negligence. Plaintiff accepts defendant's statement of the questions on appeal as framed by defendant with the exception of III which plaintiff contends does not state any issue actually in the case. We will refer more specifically to the four questions shortly.

At the time of the accident Payne was a freight brakeman employed by defendant. At daybreak on July 2, 1959 the boxcar on which Payne was riding derailed and collided with the wall of an adjacent factory building. Payne was pinned between the wall and the boxcar and was killed instantly. The cause of the derailing is the pivotal

point of this case * * * not as to what the cause was, but as to whose fault it was that the said cause was permitted to exist. The derailing of the boxcar was caused by its backing over a large accumulation of ashes, the ashes having been placed on a private spur track by the owner of the track. The track is one of two private spur tracks used for delivering freight to Standard Ultramarine & Color Co., a manufacturer of chemicals and dyestuffs in Huntington, West Virginia. This company has been referred to as "SUCO" and we will continue to refer to it by such name. The two private spur tracks are known as Track No. 2 and Track No. 3. They are joined together by a switch located just outside the gate of SUCO's property. Track No. 3 is the track on which defendant's boxcar was traveling when it became derailed by the ash accumulation. The accident occurred on the premises of SUCO. The boxcar was part of defendant's train being operated by defendant. The ash accumulation existed because of the usual custom of SUCO to collect its ash disposal by dump truck from the ash silo located (on stilts 12 to 14 feet above the track) directly over Track No. 3. This operation resulted in spilled ash accumulating on the track. SUCO undertook to keep the track cleared of the spilled ash but, according to the testimony of its employees, Lynd and Romine, the sweeping and washing to get rid of spilled ash was directed to the rail area itself, and the accumulation between the rails was left to be washed away by rain. The ash might thus become crowned higher than the rails and could also get onto the rails by a rain washing it there. There is testimony by Romine indicating that it did rain during the night preceding the accident.

The defendant had an agreement with SUCO regarding the spur track. The defendant was allowed to use it for railroad purposes free of charge. SUCO was not al-

lowed to authorize any other party to use the track without permission by defendant. It was also part of the agreement that SUCO had the duty to maintain the track. Defendant, on this appeal, contends that the District Judge erred in instructing the jury that under the circumstances present it was required to impute the admitted negligence of SUCO to defendant, even though defendant might itself be free of independent negligence. This is question I on this appeal.

Question II goes to the sufficiency of the evidence to go to the jury on the question of defendant's independent negligence if, as a matter of law, the negligence of SUCO is not imputable to the defendant.

Question IV is based on defendant's contention that an instruction should have been given to the jury as to the non-taxable nature of any award and as to the duty of the jury to in no way consider Federal income taxes in making an award.

As to question III, we think that our treatment of questions I and II will be dispositive of it.

As we view the law applicable to this situation, there are two tests by either of which the charge of the District Judge was proper. One test is that involving the duty of a railroad in the area of its own action or failure of action. The other test is the more encompassing one involving responsibility for the safety of a place where its employees are required to work. This latter calls into play the doctrine of imputable negligence which we view as being within the purview of the FELA. In applying these tests to the facts of this case it is necessary to bear in mind several well established principles. The Supreme Court has stated that the common law duty of an employer to use reasonable care in furnishing his employees with a safe

place to work obtains under the FELA. *Bailey v. Central Vermont Railway*, 319 U. S. 350, 352 (1943). About this there can be no dispute. See *Sano v. Pennsylvania Railroad Company*, 282 F. 2d 936, 937 (3 Cir., 1960), and cases cited; *Chicago Great Western Railroad Company v. Casura*, 234 F. 2d 441, 447 (8 Cir., 1956), and cases cited. What constitutes reasonableness will depend upon the dangers inherent in the particular business of the employer. *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 67 (1943); *Bailey v. Central Vermont Railway*, 319 U. S. 350, 352 (1943). A railroad has the non-delegable duty to provide an employee with a safe place to work. This is so despite the fact that it may not own, control or be under a primary obligation to maintain the premises on which the employee is injured. A railroad is not relieved from liability because such premises are unsafe or because of the existence of an unsafe condition brought about through the act of another and without fault on the railroad's part. *Sinkler v. Missouri Pacific Railroad Co.*, 356 U. S. 326 (1958); *Chicago Great Western Railway Company v. Casura*, 234 F. 2d 441, 447 (8 Cir., 1956); *Kennedy v. Pennsylvania Railroad Company*, 169 F. Supp. 406, 410 (W. D. Pa., 1959).

When defendant sent a boxcar on which Payne was properly riding onto a spur track containing a pile of ashes sufficiently high to cause derailment defendant abdicated its legal duty to its employee. The fact that the spur track was on property not owned by defendant cannot alter the duty of the defendant, as is abundantly clear from the cases cited in the above paragraph. See also the dissenting opinion of Judge Kalodner in *Shenker v. The Baltimore and Ohio Railroad Company*, 303 F. 2d 596 (3 Cir., 1962). Can the existence of a contract between defendant and SUCO have the effect of relieving defendant from this

duty." Can defendant successfully maintain that since it was the duty of SUCO under the terms of the contract to maintain the spur track that SUCO's negligence in failing to properly maintain it is not imputable to defendant? We think not.

Defendant owed a duty to decedent Payne. The jury was properly charged by the District Judge. If the jury found liability by virtue of defendant's independent negligence in sending the boxcar on a track having a dangerous condition present which could have been foreseen, the verdict is sound. If it found liability by virtue of imputing the negligence of SUCO to defendant, based on defendant's non-delegable duty regarding safety for its employees, the verdict is sound. Regardless of the rights between themselves, of defendant and of SUCO, defendant may not legally delegate to another its duty to its employee, and thereby escape liability to such employee. This is the basis for the FELA. If defendant does delegate and relies upon the services of its agent to carry out its own duty, it may not shift its liability from itself to said agent when an employee seeks to hold it directly liable. Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee. There is ample basis in the record to sustain the jury's finding of liability regardless of which of the two theories it may have proceeded under, that of independent negligence or that of imputed negligence. The above adequately disposes of the first three questions involved in this appeal.

The remaining question concerns the requested and refused instruction to the effect that any award to plaintiff would not be income to her for Federal income tax

purposes, that the jury should not add to nor subtract from any award on account of Federal income taxes. The case of *New York Central v. Delich*, 252 F. 2d 522 (6 Cir., 1958) is one in which this Court specifically held that refusal to give such a charge was not error. We are not persuaded that any of the cases cited and discussed by appellant in its briefs stands for a contrary holding. The failure to give the charge does not constitute reversible error.

There being no reversible error, the judgment of the District Court is affirmed.

O'SULLIVAN, Circuit Judge, dissenting. I am unable to agree that it was proper for the District Judge to tell the jury that any negligence of SUCO was imputable to defendant B. & O. Since SUCO's negligence had been conceded in defendant's pleadings, the instruction given was equivalent to a directed verdict for plaintiff, subject only to the jury's consideration of the amount of damages and any diminution thereof because of contributory negligence.

I recognize that a railroad will be liable to its injured employee through the negligence of a third party to whom it has entrusted the carrying on of its own operational activities. *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326. The rationale underlying the imposition of such liability is not that the activity performed by the third party is non-delegable but, rather, that a third party performing "operational activities" of the railroad is an "agent" of the railroad within the meaning of FELA. Consequently, since the terms of the statute impose liability upon a railroad for an injury or death to one of its employees resulting "from the negligence of any of the officers, *agents*, or employees" of such railroad the railroad

must pay the damages for the negligence of a third party performing the "operational activities" of the railroad. *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326. In the case before us, it was no part of the operational activities of the defendant for SUCO to dump ashes from its silo into its trucks. *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396, 398. Thus, SUCO was not an "agent" of the defendant railroad within the meaning of FELA, and under the clear language of the statute, the defendant is not responsible for SUCO's negligence.

It is, of course, correct to say that defendant's duty to provide its employees with a safe place in which to work could not be delegated to SUCO. Likewise, the fact that the injury occurred on premises owned by a third party would not excuse the railroad for its negligence in failing to provide a safe working place. *Atlantic Coast Line R. Co. v. Robertson*, 214 F. (8) 746, 751 (C. A. 4, 1954); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. (2) 473, 477 (C. A. 8, 1948). These rules, however, do not justify a holding that whenever SUCO's employees commit acts of negligence which cause injury to the railroad's employees, the railroad will be held liable without any fault on its part. Negligence of the defendant, or of its "agents," is still a necessary ingredient to recovery under FELA. *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 507, 1 L. Ed. (2) 493, 500; *Kaminski v. Chicago River & Indiana R. Co.*, 200 F. (2) 1, 3 (C. A. 7, 1952).

The instruction given in the District Court allowing the jury to impute SUCO's negligence to the defendant has the effect of holding the defendant liable without any fault on its part. Such an instruction changes the scope and tenor of FELA from an act providing an employee of a railroad relief in the case of an injury caused "in whole

or in part" by the railroad's negligence, into a workmen's compensation act, but without any of the limitations and safeguards found in such acts. Congress, in enacting FELA, did not pass a workmen's compensation law which would provide an employee with compensation for every injury incurred during the course of his employment without regard to any fault on his employer's part. See, *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 509, 539-540, 1 L. Ed. (2) 493, 501, 528-529.

Plaintiff's argument here seeks to obtain the benefits of two disparate theories of liability without accepting the detrimental consequences attendant on either of them. Under FELA, the employer is stripped of his common law defenses, contributory negligence of the employee being only a factor in mitigation of damages. FELA, however, allows recovery only for the employer's negligence. On the other hand, at common law, an employer will be held accountable for his employees' injuries, strictly and without regard to any fault on his part, if such injuries are caused by the negligence of a third party to whom the employer has entrusted the performance of a non-delegable duty. *Prosser, Handbook of the Law of Torts*, 359 (2d Ed., 1955). But, in a common law action, the contributory negligence of the injured party, however slight, is a complete bar to his recovery. Since plaintiff's decedent in the case before us was found guilty of some contributory negligence, it can be safely assumed that plaintiff wishes us to apply the common law doctrine of vicarious liability only to the extent that it renders defendant liable without fault. For the rest, plaintiff would have us apply FELA.

Plaintiff has cited no Supreme Court case to us in support of this proposition. The two cases cited in that connection are not authority for such a novel construction of FELA. In *Baltimore & Ohio R. Co. v. Alpha Portland*

Cement Co., 218 F. (2) 207 (C. A. 3, 1955), plaintiff railroad sought to obtain indemnity from defendant industry for an amount which the railroad had paid in *settlement* of an employee's claim for damages. The injury occurred on defendant's premises. No question was raised concerning plaintiff's liability. However, in affirming the judgment of the District Court's award of indemnity, the court noted that the trial judge had found the plaintiff railroad guilty of *negligence*, and that "its negligence * * * (was) merely the breach of its nondelegable duty to furnish a safe place for its employee to work, even though the place became unsafe through the act of a third party and without fault on its part." 218 F. (2) at 210.

That is not the instruction given in the case before us. The trial judge here did not qualify his charge by saying, "If you find that the defendant did not exercise reasonable care in furnishing its employee with a safe place in which to work by entrusting the maintenance of the SUCO track and siding to SUCO, you may find the defendant guilty of negligence." The charge given operated to relieve plaintiff of her burden of proving defendant's lack of reasonable care—its negligence—and so was prejudicial. The other case relied upon by plaintiff, *Kennedy v. Pennsylvania Railroad Company*, 169 F. Supp. 406 (W. D. Pa., 1959) reversed 282 F. (2) 705 (C. A. 3, 1960), was also primarily concerned with the question of indemnity. While in the District Court's opinion there is language which might support plaintiff's position (p. 410), it does not appear that the trial judge there gave such an instruction to the jury. The case was submitted on interrogatories which were couched in terms of the railroad's negligence, rather than vicarious liability. 282 F. (2) 708.

To summarize: It was the duty of the B. & O. to see to it that the SUCO siding was maintained in such a way as

to provide its employees with a safe place to work. If it *negligently* failed to discharge such duty, it could not excuse its *own negligence* by saying that it had delegated such duty to another. But, if a railroad fully discharges its duty to maintain a safe place for its employees, it will not vicariously or by imputation be charged with the positive and unexpected negligence of another, unless the railroad has actual or constructive knowledge of the unsafe condition and does nothing about it. *Kaminski v. Chicago River & Indiana R. Co., supra; Wetherbee v. Elgin, Joliet & Eastern Ry. Co.*, 191 F. (2) 302 (C. A. 7, 1952); *Denver & Rio Grande R. Co. v. Conley*, 293 F. (2) 612, 613 (C. A. 10, 1962). To hold otherwise would be to make the railroad an insurer of the safety of its employees, a duty not imposed on it by FELA. *Inman v. Baltimore & Ohio R. Co.*, 361 U. S. 138.

With the exception of the language in the Third Circuit cases cited above, none of the decided cases impose absolute liability on a defendant railroad for an injury occurring on another's premises in the absence of facts indicative either of actual knowledge or constructive knowledge of the unsafe condition. *Kaminski v. Chicago River & Indiana R. Co., supra; Wetherbee v. Elgin, Joliet & Eastern Ry. Co., supra; Denver & Rio Grande R. Co. v. Conley, supra; Atlantic Coast Line R. Co. v. Robertson, supra; Terminal R. Ass'n of St. Louis v. Fitzjohn, supra.* Such a requirement is entirely reasonable and consistent with the policy of FELA which is to impose liability on a railroad for its own negligence and not for that of others, except its "agents." In the case before us, there was evidence from which the jury could find that the ash accumulation which caused the derailment was the result of a single and unusual act of negligence by SUCO and that the railroad

had not had reasonable opportunity to discover it and require its removal.

This dissent is not from the District Judge's submission of the question of the railroad's own negligence, but from his unqualified statement that negligence of SUCO's employees in the maintenance of SUCO's track was to be imputed to defendant.

I feel it appropriate, also, to express my own view of the District Court's refusal to advise the jury that its award of damages would not be subject to Federal income tax. The proffered instruction was as follows:

> "I charge you as a matter of law that any award made to Plaintiff in this case, if any is made, is not income to the Plaintiff within the meaning of the Federal Income Tax Law. Should you find that Plaintiff is entitled to an award of damages, then you are to follow the instructions already given by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal Income Taxes."

I would question the propriety and necessity of giving such instruction in its entirety, but wish to record my opinion that a short statement that the plaintiff will not be required to pay income tax on the amount awarded, should be made to the jury in this kind of case. This Court in *New York Central Railroad Company v. Delich*, 252 F. (2) 522, 527 (C. A. 6, 1958) held that it was not error in a death case to refuse to charge that "If you find in favor of the plaintiff, I warn you not to consider income tax liability on your award." Such a cryptic warning was not equivalent to a simple and clear statement that a plaintiff's award is not subject to income tax. It would tend to obscure, rather than disclose the truth. I do not consider that decision at variance with my position here.

I realize that the giving of an instruction that would require the jury to consider what income tax a deceased or injured plaintiff may have paid out of past earnings or what would be the likely income tax impact on future earnings, could lead to confusion. There is no reason, however, to fear confusion from a simple statement that a plaintiff's judgment in such damage case will not be diminished by the imposition of income tax.

Our contemporary public mind is well conditioned to the belief that today there is almost nothing of money value which anyone receives that is not shared in substantial degree with the national government. As pointed out by Chief Judge Lumbard in his dissent in *McWeeney v. N. Y., N. H. & H. R. Co.*, 282 F. (2) 34, 41 (C. A. 2, 1960), the public today reads of the rather spectacular share that the government takes of large sums "won on television quiz programs or in lotteries and sweepstakes." The public is informed of the amount that is taken in income taxes from large salaries paid to business executives, stars of the entertainment world and other large earners, and the amounts that are taken in taxes from decedent's estates. Have we any assurance that today's juries, awarding verdicts in the range of the one before us, $136,267.23, are aware that, unlike almost any other receipt of money, they are tax free? I would venture a guess that a substantial number of lawyers (excluding those engaged in the personal injury business) would be unsure of the tax consequences of receiving a $100,000.00 personal injury verdict. Should we expect jurors to be better informed?

Some of the cases considering the subject merely hold that it would not be error to give a simple instruction on the point but, as plaintiff argues here, hold that the matter should be left to the trial judge's discretion. See, *Mc-*

Weeney v. N. Y., N. H. & H. R. Co., supra, p. 39 I do not think we can so easily dispose of the subject. I grant, as stated above, that jurors' deliberations might be impeded if they were required, in computing past earnings and calculating loss of future earnings, to guess as to past or future tax rates and regulations. Simple advice, however, that their present award will not be reduced by income tax does not have such vice. If, as seems to be conceded, no prejudice will be visited upon a plaintiff by such advice, why withhold it? In my opinion, serious harm can result to a defendant from jurors' lack of information in this field. They should know the truth. Except for the loss of unfair advantage, plaintiffs will not suffer from a jury knowing such truth. I consider it reversible error to refuse a simple instruction on the subject.

I would reverse the judgment and order a new trial.

APPENDIX B.

JUDGMENT.

(Filed October 31, 1962.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came onto be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ THOMAS P. THORNTON,

United States District Judge.

(Sitting by Designation.)

APPENDIX C.

STATUTES.

45 U. S. C. § 51:

"*Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence—Definition of employees.*—Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases'

(approved April 22, 1908), as the same has been or may hereafter be amended." (Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

49 U. S. C. § 1(9)

"(9) *Switch connections and tracks*—Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this part, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money."

West Virginia Code, 1955, § 2563:

"§ 2563. [1] *Adequate Facilities; Reasonable Rates; Discontinuing Service.*—Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference. All charges, tolls and rates shall be just and reasonable, and no change shall be made in any tariffs, rates, joint rates, tolls, schedules or classifications except as herein provided. Every railroad shall permit switch connections for intrastate business to be made with its tracks at suitable and safe points by other carriers or shippers, upon such terms and conditions as the commission may prescribe, whenever, in the judgment of the commission, the business to be offered by the connecting company or shipper justifies it. Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just, to make reasonable connections with trains on branch lines of such railroads and with all connecting railroad lines; to require any passenger trains to stop at junctions or intersections with other railroads; and may prescribe the number of men required to constitute safe crews for the handling of trains on any railroad in this State or any division of any such railroad. No railroad or other public utility shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or time-table, without first obtaining authority from the commission so to do, unless the same be done under uniform rules and regulations filed by

such railroad or public utility with the public service commission and approved by said commission." (1913, c. 9, § 4; 1915, c. 8, § 4; 1921, c. 150, § 4; Code 1923, c. 15-0, § 4.)

26 U. S. C. § 104(a)(2)

COMPENSATION FOR INJURIES OR SICKNESS.

"§ 104(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

* * * * *

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; * * *"

APPENDIX D.

DEFENDANT'S REQUESTED SPECIAL INSTRUCTION.

"Ladies and Gentlemen of the Jury, as I have told you, under the Federal Employers' Liability Act the Defendant Railroad owed Plaintiff a continuing and non-delegable duty to employ reasonable care to furnish its employees with a reasonably safe place to work. In determining whether or not the Defendant Railroad fulfilled that duty under the circumstances of this case you may consider all of the facts and circumstances which the evidence indicates the Railroad knew or should have known of, affecting the Safety of the train operations over the No. 3 spur track of Standard Ultramarine and Color Company. Among other things, you would be entitled to consider the history of railroad operations over track No. 3; the existence of the sidetrack agreement between the Railroad and Standard; prior instances if any, of dangerous quantities of ash beneath the silo; inspection procedures followed by the Railroad and such inspection and cleanup activities conducted by Standard Ultramarine employees as may have been known to the Defendant Railroad; and any other evidence tending to indicate the extent, if any, to which the Railroad was justified in the exercise of ordinary care in relying upon Standard Ultramarine to maintain the track in a safe operating condition. If, after considering these and other factors, you find that the Railroad acted in the exercise of ordinary care in permitting Standard Ultramarine to assume some part of the responsibility for the inspection and maintenance of track No. 3, then you cannot return a verdict for Plaintiff simply because one or more employees of Standard Ultramarine may have been negligent in discharging those responsibilities. In other words, your determination in this case must be

whether the Defendant Railroad, and not Standard Ultramarine, was negligent, and the negligence of Standard Ultramarine, if any, can be made the basis for a verdict for Plaintiff if, and only if, the Defendant Railroad, having reasonable cause to anticipate that Standard would fail to discharge its obligation to keep the track in safe operating condition, thereafter itself failed to exercise reasonable care to discover and correct any dangerous track condition created through the negligence of Standard Ultramarine.

Thus, if you find that Standard Ultramarine alone was negligent, your verdict must be for the Defendant."

APPENDIX E.

SPECIAL INTERROGATORIES REQUESTED BY DEFENDANT TO BE SUBMITTED TO THE JURY.

(Denied by Trial Court November 30, 1960.)

"The jury will supply answers to each of the following interrogatories, in writing, in addition to completing one of the general verdict forms submitted herewith:

1. Do you find that one or more employees of Standard Ultramarine and Color Company were negligent in any respect proximately or directly causing the death of Ralph Payne?

Answer (Yes or No):

2. If your answer to interrogatory 1 is 'yes' state what you find such negligence consisted of:

3. Do you find that one or more employees of The Baltimore and Ohio Railroad Company were negligent in any respect proximately or directly causing, in whole or in part, the death of Ralph Payne?

Answer (Yes or No):

4. If your answer to interrogatory 3 is 'yes' state what you find such negligence consisted of:

5. Do you find that a dangerous quantity of ashes was present on the track beneath the ash silo for a sufficient length of time for any employee of the defendant railroad

other than Ralph Payne to have discovered it, in the exercise of ordinary care, prior to any train movement thereover?

Answer (Yes or No):

6. If your answer to interrogatory 3 is 'yes' do you find that Ralph Payne was himself negligent in failing to discover such ashes, or in any other respect proximately or directly contributing to his death?'

Answer (Yes or No):

7. If your answer to interrogatory 6 is 'yes' state what you find such negligence consisted of:

8. If the answers to either or both of interrogatories 1 and 3 is 'yes' and your answer to interrogatory 6 is also 'yes' indicate in the blanks provided the proportion or percentage of the total negligence for which Ralph Payne on the one hand, was responsible, and, on the other hand, the proportion or percentage of the total negligence for which Standard Ultramarine and defendant were together responsible.

Ralph Payne's negligence	
Standard Ultramarine and Defendant's combined negligence	
Total negligence	100%

Office-Supreme Court, U.S.
FILED
JAN 24 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 697.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

CRAIG SPANGENBERG,
1500 National City Bank Building,
Cleveland 14, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

TABLE OF CONTENTS.

Introduction 1

Summary of Argument 1

Argument 2

A. The Issue of Imputed Negligence (Question No. 1) 2

1. Policy Considerations 2

2. The Decision Below Is Not in Conflict With a Decision of This Court 5

3. Decisions of Other Courts of Appeals 8

4. The Statutes Requiring Switch Track Connections 11

B. Is the Trial Court Compelled to Charge on the Tax Consequences of a Verdict? (Question 2) 12

Conclusion 13

TABLE OF AUTHORITIES.

Cases.

Baltimore & Ohio R. Co. v. Alpha Portland Cement Co., 218 F. 2d 207 (C. A. 3d. 1955) 9

Booth-Kelly Lumber Co. v. Southern Pacific Co., 188 F. 2d 902 12

Floody v. Great Northern R. Co., 102 Minn. 81. 112 N. W. 875 5

Fort Worth & D. C. R. Co. v. Smith, 39 Tex. Civ. App. 92. 87 S. W. 371 5

Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343. 21 S. W. 133 5

Kaminski v. Chicago River and Indiana Ry. Co., 200 F. 2d 1 (C. A. 7. 1952) 8. 9

Luton Mining Co. v. Louisville & N. R. Co., 276 Ky. 321, 123 S. W. 2d 1055 11

North Chicago Street R. Co. v. Dudgeon, 184 Ill. 477, 56 N. W. 796 5

Shenker v. Baltimore & Ohio R. Co., 303 F. 2d 596 (C. A. 3d 1962) 10, 11

Sinkler v. Missouri Pac. R. Co., 356 U. S. 326 5, 7, 9

Story v. Concord & Montreal R. Co., 70 N. H. 364, 48 A. 288 5

Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534, 48 A. 288 5

Ward v. Atlantic Coast Line R. Co., 360 U. S. 396 5, 6, 7

Wetherbee v. Elgin, Joliet and Eastern Ry. Co., 191 F. 2d 302 (C. A. 7, 1952), 204 F. 2d 755, cert. den. 346 U. S. 867 8, 9

Statutes.

49 U. S. C. Sec. 1 (9) 11

West Virginia Code, 1955, Sec. 2563 11

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 697.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

INTRODUCTION.

Respondent accepts, in the form presented by Petitioner, the Opinions Below, Jurisdiction, Questions Presented for Review, Statutes Involved, and Statement of the Case.

SUMMARY OF ARGUMENT.

A railroad owes the duty to its operating employees to furnish a track reasonably safe for the movement of cars. The duty to furnish a safe track is non-delegable. The railroad may contract to have a third party do the work of maintaining the safety of the track, but it will remain responsible to its own employee if the delegated work is so carelessly done that it causes derailment and injury to the employee. The common law liability for breach of a non-delegable duty remains within the purview of the Federal Employers' Liability Act.

ARGUMENT.

A. THE ISSUE OF IMPUTED NEGLIGENCE (QUESTION NO. 1).

1. Policy Considerations.

This is a case where a railroad brakeman was crushed to death when the car he was riding derailed on a dirty, fouled track. There is no substantial dispute as to the facts. The crux of the legal dispute is whether the common law liability for the breach of a non-delegable duty is included within the purview of the Federal Employers' Liability Act. The trial judge and two judges of the Court of Appeals held that the common law liability remains. One judge of the Court of Appeals dissented, saying that imputed negligence cannot constitute the employer's negligence under F. E. L. A.

Ralph Payne, the decedent, was a member of the switching crew of the defendant railroad, working the night trick on a run which picked up empty cars and spotted loaded cars on various industry side tracks at Huntington, West Virginia. One of the work orders on the night of his death was to enter the plant of Standard Ultramarine and Color Company, commonly called SUCO. As he rode the leading end of an unlighted car into the darkness between two plant buildings the car wheels ran upon three or four inches of dark cinder lying over the rails on a curving track. The ashes lifted the wheels off the track and derailed the car, which rammed through the wall of a plant building, crushing Payne.

No railroad employee had been assigned any duty to inspect this track for obstruction. The track inspector who checked the rails and ties once a month said that he inspected the track only for proper gauge and solid fastenings. The possibility of spilled ash would not, he said, be

his responsibility (R. 138a). The conductor of the crew said that he expected to find a clean track and gave his crew men no inspection duty before sending in the train (R. 190a). He did not expect the lead brakeman, Payne, to see a cinder-fouled condition of the track in the darkness (R. 191a). In a very real sense Payne staked his life on the assumption that the track would be clean enough to hold a car, but no railroad employee had any assigned duty to see that the rails were kept clean nor to inspect them for safety before the nightly switching movements.

The work of keeping the track clear was work that was done by SUCO employees under the agreement between SUCO and the Railroad. Under this agreement the Railroad could use the track for its purposes without charge. SUCO could not authorize any other party to use the track without the Railroad's permission. SUCO, under the agreement, undertook to maintain the track inside its property line (Contract, Plaintiff's Exhibit 23, R. 120a-122a).

It is the Petitioner Railroad's position here that it would be liable "if, and only if, having reasonable cause to anticipate that SUCO would fail to discharge its obligation to keep the track in safe operating condition, it thereafter itself failed to exercise reasonable care to discover and correct any dangerous track condition created through the negligence of SUCO." This is the language of defendant's special charge, set forth in Petitioner's brief as Appendix D. If this were the law, then a railroad would have no duty to furnish a safe track to its operating employees except while running on its own right-of-way. On all movements of trains while switching and spotting cars on industrial sidings, and while running over the tracks of other railroads, the employer railroad could delegate away its obligation to furnish a track system adequate to hold

its cars. It would not be liable for a derailment caused by a defective, fouled or broken track unless it had actual or constructive notice of the unsafe condition. It would clearly be to the railroad employer's interest to avoid the opportunity for notice by avoiding inspection, as it did here, contracting away all maintenance responsibility to the third party.

The employee who is required to ride upon the unsafe track has no knowledge of the terms of track leasing and track maintenance agreements made by his employer. Even if he knew the terms of the agreement, he could not change them, nor demand inspection, nor could he as a practical matter undertake to perform continual track inspection by himself. He looks to his employer to furnish a safe track. He has a right to expect a safe track. His very life depends on it.

It is no answer to the problem to say, as does Petitioner, that he can look to the third party to recover for the negligent maintenance of the track. If the employee is killed in West Virginia, as was plaintiff's decedent here, he would be bound by the arbitrary and archaic limit of $20,000.00 for wrongful death under West Virginia statute, and would have to face the common law defenses of assumption of risk and contributory negligence abolished by the F. E. L. A. His work would be the same, regardless who owned the track, but his rights would be far different.

On policy considerations the trial court and the majority of the appellate court were right in saying: "The employee need not look elsewhere for his protection. He has a right under F. E. L. A. to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee."

2. The Decision Below Is Not in Conflict With a Decision of This Court.

It is argued by the Petitioner that the decision in the instant case is in direct conflict with *Ward v. Atlantic Coast Line R. Co.*, 360 U. S. 396, and is outside the scope of *Sinkler v. Missouri Pac. R. Co.*, 356 U. S. 326. It is the Respondent's position that this case is parallel neither to *Ward* nor to *Sinkler*, but is controlled by the doctrine of earlier cases cited with approval in *Sinkler*. In the *Sinkler* opinion this Court noted the common law doctrine that the duty to furnish a safe place in which to carry on the operational activities of the railroad crew is non-delegable, citing *Floody v. Great Northern R. Co.*, 102 Minn. 81, 112 N. W. 875, and *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. W. 796, in the body of the opinion; and citing, among others, *Wabash, St L. & P. R. Co. v. Peyton*, 106 Ill. 534, 48 A. 288; *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133; and *Fort Worth & D. C. R. Co. v. Smith*, 39 Tex. Civ. App. 92, 87 S. W. 371 in footnote 3 (356 U. S. at 328).

Each of these cases involved a railroad employee who was injured by reason of a defective track or a fouled and obstructed track owned or controlled or maintained by a third party. In each case the dangerous track condition arose from the negligence of the third party. In each case the negligence of the third party or independent contractor was imputed to the railroad employer on the familiar common law principle that the duty to furnish a suitable track is non-delegable. The opinion in *Story v. Concord & Montreal R. Co.*, 70 N. H. 364, 48 A. 288, states the rule in this language:

> "Under whatever names they were styled in their agreement * * * the undisputed fact of the rightful use of the Boston & Maine tracks cared for and re-

> paired by the Boston & Maine" [the third party] "established that the Boston & Maine were the agency employed by the defendants in the performance of their duty of furnishing a safe and suitable track for their employees. Having either by express agreement or by permissive use of the Boston & Maine track employed that corporation as their agent in the performance of their master's duty, the defendants thereby became responsible for the acts and chargeable with the negligence of such agent; * * *."

The instant case is exactly comparable. The injured man was an operating employee of the railroad, engaged in the work that is the very essence of railroad activity—moving a freight car over a freight track. The duty to furnish a safe track for this employee was non-delegable at the common law. This does not mean the maintenance and inspection work could not be contracted out. The physical performance of the work could be done by others, but the responsibility for careful performance could not be delegated away. The third party who carelessly did the actual work of track maintenance was, as to the railroad employee, an agent of the railroad.

The words "as to" constitute the key phrase. The third party is the railroad's agent *as to* the railroad employee; although an independent contractor *as to* the railroad employer. Under this doctrine the third party never becomes an *employee* of the railroad, but only an agency for whose negligence the railroad is vicariously liable as to the railroad's own employee.

The *Ward* case is easily distinguished on this basis. In *Ward* the railroad had agreed with the industry that the industry would maintain the private sidetrack. The industry hired the plaintiff in that case to do repair work. On the day he was injured he was not an employee of the railroad, but had hired out independently to the industry

as its employee. The F. E. L. A. gives an *employee* of the railroad the right to recover for negligence of an *agent* of the railroad; but it does not by its terms nor by any interpretation of its terms give an *agent* of the railroad the right to cover for the negligence of another agent.

In *Ward* it was claimed that the industry employee must be deemed to be an *employee* of the railroad while doing the maintenance work; and this claim was properly denied. The analogy to the instant case would be to argue that the SUCO employees who sometimes shoveled out the clogged rails were railroad employees while shoveling, and could recover for each other's negligence when so engaged. No such claim has been made nor suggested. The SUCO employees remained SUCO employees, in the service of the industry. At the same time they were the agency adopted by the railroad to discharge its duty of furnishing a safe track, and as to Ralph Payne they were agents of his employer.

Let us suppose that in the *Ward* case the industry employees had so carelessly repaired the track that it was unsafe, and when the railroad crew next came into the siding the train derailed and killed a brakeman. Could the railroad then say it has discharged its duty to its own employee by delegating away to the industry the responsibility for furnishing an adequate track? It could not at common law, and it has never been suggested before the dissenting opinion was written below that F. E. L. A. *diminished* the employee's rights under common law concepts of negligence and imputed negligence.

The instant case is much closer to *Sinkler* than to *Ward*. In *Sinkler* a railroad employee was injured by the negligence of a third party crew who were switching the railroad's car. This Court there held that the term "agent" must be given an accommodating scope so that all

those who perform the operational activity of moving cars for the railroad are agents of the railroad whose cars are moved. In the same pattern it should be said that those who furnish the track over which the cars must be moved by the railroad employees are agents of the railroad, as to the operating crew, in performing the railroad's duty of furnishing to its employees a reasonably safe rail and roadbed. This is not new doctrine, but old doctrine, and no accommodating scope is required to bring this meaning of agency within the purview of F. E. L. A.

Under the Act, the railroad is liable for defects, due to its negligence, in its track and roadbed. The term "its track" must mean the track over which it runs its cars, regardless where record legal title to the track lies. The term "its negligence" includes the negligence of others, imputed to it by reason of the non-delegable quality of its duty to keep its track safe for car movements.

3. Decisions of Other Courts of Appeals.

Respondent has cited, as conflicting decisions, *Kaminski v. Chicago River and Indiana Ry. Co.*, 200 F. 2d 1 (C. A. 7, 1952); and *Wetherbee v. Elgin, Joliet and Eastern Ry. Co.*, 191 F. 2d 302 (C. A. 7, 1952), subsequent appeal 204 F. 2d 755, cert. den. 346 U. S. 867.

The *Kaminski* case involved a non-operating employee, a car checker, walking along a privately maintained path of the industry when he was injured. It is not in point. The *Wetherbee* case involved derailment caused by a plank on the track, but it is by no means clear the plank was on the track because of negligence of the industry. Respondent here recognizes that negligence is still required, even though it may be imputed negligence which imposes the liability.

The result in *Wetherbee* is inconsistent with Respondent's position here to the extent that the opinion required notice of the unsafe track to be brought home to the railroad. However, the decision cannot fairly be construed as denying the validity of Respondent's position in the instant case. The *Wetherbee* opinion nowhere touches upon the common law concept of non-delegable duty. Either counsel in that case did not know the theory of vicarious liability, or thought that other approaches to liability were stronger, or believed he could not prove the industry-agent's negligence caused the defective track condition. If counsel for the plaintiff in that case did not approach it as a non-delegable duty case, and did not aid the court by briefing or arguing that point, then the adverse decision is not persuasive. In any event both *Wetherbee* and *Kaminski* were decided some years before *Sinkler*, which restated the common law concept of non-delegability.

The defendant in the instant case itself advanced that concept successfully for its own benefit in the case of *Baltimore & Ohio R. Co. v. Alpha Portland Cement Co.*, 218 F. 2d 207 (C. A. 3d, 1955). The Railroad was switching cars over a switch track owned and maintained by the Cement Company under a contract with the Railroad. The Cement Company had a private crossing over the siding which had no planking, but only dirt fill, which had become muddy. Trucks of the Cement Company had slopped the mud up over the rails, where it became frozen.

The Railroad's switch crew shoved a cut of cars over this crossing when it was fouled by the frozen mud and ice. The leading car derailed, and a brakeman riding the leading car was crushed between the car and an adjacent building. The condition of the crossing was concealed by a light snow at the time. The Railroad had inspected the

track two days before, and at that time found nothing wrong. Its first knowledge of the dangerous condition came with the derailment.

The Railroad settled the claim of the injured brakeman, and brought action for indemnity against the Cement Company. Obviously it would not be entitled to indemnity unless it had been liable for the injuries to the brakeman. The trial Court found that the injuries were caused by the negligence of the industry in creating the unsafe condition at the crossing and in failing to remedy it as required by the side track agreement. The trial Court found specifically that the place became unsafe without fault of the Railroad and by sole fault of the Cement Company, but that the condition breached the non-delegable duty of the Railroad to furnish a safe place to work. Full indemnity was given to the railroad.

On appeal the Court of Appeals for the Third Circuit affirmed, saying, at 211:

> "We are thus presented with a case in which the defendant (the Cement Co.) was actively negligent in creating and not correcting the unsafe condition of the track which caused the accident while the plaintiff's (B. & O. R. Co's.) only negligence consisted of the defendant's negligence *vicariously imputed to it by virtue of its non-delegable duty* to its employee, Miller, to provide him with a safe place to work."

The force of this case was not diminished by *Shenker v. Baltimore & Ohio R. Co.*, 303 F. 2d 596 (C. A. 3d 1962), certiorari granted November 19, 1962. There a B. & O. employee was injured while performing services for the P. & L. E. and the majority opinion in the Court of Appeals treated the question as though the P. & L. E. had employed the B. & O. to do P. & L. E. work so that the employee would be in effect a loaned servant to the P. & L. E.

The non-delegable duty would then be imposed upon the P. & L. E. The dissent in that case viewed the B. & O. employee as doing B. & O. work on P. & L. E. premises, and accordingly entitled to the benefit of the non-delegable duty rule. In the instant case there is no question that Payne was a B. & O. operating employee on a B. & O. train doing B. & O. work, and the complicating problems of the *Shenker* case are not involved.

There is no true conflict in the decisions below which require resolution by this Court.

4. The Statutes Requiring Switch Track Connections.

Petitioner has cited, and printed in its Appendix C, the text of 49 U. S. C. Sec. 1 (9) and West Virginia Code, 1955, Sec. 2563, which require a common carrier under certain conditions to furnish a switch connection with private side tracks; and argues that the carrier's responsibilities are fully discharged when it has provided such switch connection. The statutes are irrelevant. The carrier's duties as to the industry may be fully discharged when it builds the switch, but its duty to its own employee to furnish a reasonably safe track follows the employee wherever his work orders take him. The Railroad here was not required to run its cars over the length of the private tracks. Its legal duty as a carrier would be discharged when it delivered the cars onto the siding past the switch, leaving further movement and precise spotting at plant doors to the industry. If the Railroad elects to perform the further service of pick-up, spotting and switching work, it acts on business judgment and not under legal compulsion. It can fully protect itself, under these circumstances, by requiring the industry to furnish a suitable indemnity agreement. *Luton Mining Co. v. Louisville & N. R. Co.*, 276 Ky. 321, 123 S. W. 2d 1055. It is well estab-

lished that under such an indemnity contract the Railroad may obtain full indemnity for any loss where the Industry's negligence imposes liability upon the Railroad for injury to an employee on the private side track. *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 188 F. 2d 902.

Should the writ of certiorari be granted in the instant case to restate these propositions? There is no necessity for it. We suggest that the ruling of the trial court was correct. The decision of the Court of Appeals was right. The opinion of that court is concise, well-reasoned, and well-written. It properly applies the teaching of the *Sinkler* case, recently decided by this Court and will serve as a proper guide to other trial courts which may face a similar problem. There is no reason to grant certiorari under these circumstances, and the petition should be denied.

B. IS THE TRIAL COURT COMPELLED TO CHARGE ON THE TAX CONSEQUENCES OF A VERDICT? (QUESTION 2.)

It is true that the award to the plaintiff, when collected, will not be subject to income tax. It is also true that it will be deductible as a business expense by the defendant. It is probably true that the gross award will be reduced by trial and appellate costs and attorney fees. It might be illuminating to tell the jury all these truths, but none of them are directly related to any issue in the case.

There is no reason to believe that the jury thought the verdict would be taxable, or attempted to increase it to the extent of assumed taxes in violation of the Court's instructions on damages. It may well be that if a jury is in doubt and questions the Court that the jury should then receive instruction. Where no inquiry is made there seems no

reason to assume the jury manipulated the verdict on an improper consideration of tax consequences.

An instruction on tax consequences is within the discretion of the trial Judge. No federal case has held it is error to give such instruction. No federal case has held it is error to refuse such instruction. It may be that this Court will feel free to give an advisory opinion on the subject for future cases, but this can be done in any injury case in which certiorari is granted on other grounds. There is no need to review this case for that limited point.

CONCLUSION.

The petition for writ of certiorari should, for the foregoing reasons, be denied.

Respectfully submitted,

CRAIG SPANGENBERG,
Counsel for Respondent.

Office Supreme Court, U.S.
FILED
JAN
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 697.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER
In Support of Petition for Certiorari.

ALEXANDER H. HADDEN,
DWIGHT B. BUSS,
1956 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO—MAIN 1-8647

TABLE OF CONTENTS.

Introduction	1
Argument	2
This Is a Case of First Impression	2
The Common Law Cases	2
The Ward Case	4
The Statutes Requiring Switch Connections	4
The So-called "Policy" Question	5
Conclusion	6

TABLE OF AUTHORITIES.

Cases.

Atlantic Coast Line R. Co. v. Robertson, 214 F. 2d 746 (C. A. 4th. 1954)	6
Baltimore and Ohio Railroad Company v. Alpha Portland Cement Co., 218 F. 2d 207 (C. A. 3d. 1955)	2
Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100 (C. C. A. 8th. 1902)	3
Chesapeake & Ohio R. Co. v. Thomas, 198 F. 2d 783 (C. A. 4th. 1952)	6
Engel v. New York, P. & B. R. Co., 160 Mass. 260, 35 N. E. 547 (1893)	3
Floody v. Great Northern Ry. Co., 102 Minn. 81, 112 N. W. 875 (1907)	2
Ft. Worth & D. C. R. Co. v. Smith, 39 Tex. Civ. App. 92, 87 S. W. 371 (1905)	3
Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133 (1892)	3

North Chicago Street R. Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 796 (1900) 3

Sinkler v. Missouri Pacific R. Co., 356 U. S. 326 (1958) 2, 3, 5

Terminal R. Association of St. Louis v. Fitzjohn, 165 F. 2d 473 (C. C. A. 8th, 1948) 6

U. S. v. American Sheet & Tinplate Co., 301 U. S. 402 (1937) 4

Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705 (1883) 3

Ward v. Atlantic Coast Line R. Co., 362 U. S. 396 (1960) 4, 6

Texts.

39 *Corpus Juris*, Master and Servant, § 508, p. 392 (1925) 3

51 *Corpus Juris*, Railroads, § 1177, p. 1109 (1930) 3

26 *Cyc.* 1127 (1905) 3

Statutes.

49 U. S. C. § 1[9] 4

45 U. S. C. § 3 6

West Virginia Code, 1955, § 2563 4

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 697.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, Deceased,
Respondent.

REPLY BRIEF OF PETITIONER
In Support of Petition for Certiorari.

INTRODUCTION.

Petitioner believes that most of the points and contentions advanced in respondent's brief[*] are adequately covered in the petition for certiorari, so that no detailed rejoinder is here necessary. However, since respondent would apparently have this Court believe that the decisions of the courts below are fully supported by well-settled and long-standing legal principles, and is unwilling to concede even the existence of novel questions of law, petitioner submits the following brief comments.

[*] Hereinafter cited as "RB."

ARGUMENT.

This is a Case of First Impression. The only case cited by respondent in support of the imputed negligence charge (Question No. 1) is *Baltimore and Ohio Railroad Company v. Alpha Portland Cement Co.*, 218 F. 2d 207 (C. A. 3d, 1955). However, as noted in Judge O'Sullivan's dissent below (Petition for Certiorari, pp. 32-3), that case is distinguishable upon the ground, among numerous others, that it was a suit for *indemnity* (following settlement in the employee's action), in which the question of the railroad's negligence with respect to its employee was never tried out. It could not, therefore, and *did* not involve any imputed negligence charge. The language from the opinion quoted at page 10 of respondent's brief is thus nothing more than the court's gratuitous characterization of the nature of the railroad's underlying FELA liability; it expresses a concept which was neither urged upon the court nor necessary to the decision. Hence, the *Alpha* case could not have been, and *is* not, a precedent for the charge given in the instant case.

One would suppose from the bland, confident tone of respondent's brief that the books would abound with FELA cases approving the imputation of negligence on facts similar to this case. Respondent's failure to cite a single authority makes crystal clear, however, that this case breaks new and uncharted ground so far as railroad liability is concerned.

The Common Law Cases. Respondent seemingly concedes (RB 5) that *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326 (1958) is factually not in point. It is said, however, that the common law cases cited in *Sinkler*, *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875

(1907); *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796 (1900); *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705 (1883); *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133 (1892), and *Ft. Worth & D. C. R. Co. v. Smith*, 39 Tex. Civ. App. 92, 87 S. W. 371 (1905), are controlling, in that each of them "involved a railroad employee who was injured by reason of a defective track or a fouled and obstructed track owned or controlled or maintained by a third party." (RB 5.)

Without exception, however, each of these earlier decisions involved injuries arising out of *publicly franchised* operations of the defendant, rather than the maintenance of private sidetracks. Thus, none of them can be regarded as authority for extending the imputed negligence theory beyond the facts of the *Sinkler* case, since they all turn upon a railroad's responsibility for injuries arising out of *common carrier* activities delegated to *other railroads*. Even on *that* point, as noted in the *Sinkler* case, authority at common law was very much divided. See 356 U. S. at 329 n. 3; *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100, at 110-111 (C. C. A. 8th, 1902), and cases there cited. So far as petitioner can determine, there are *no* common law authorities extending railroad liability to the facts of the present case. Such cases as there are appear to have reached a contrary result. *Engel v. New York, P. & B. R. Co.*, 160 Mass. 260, 35 N. E. 547 (1893; opinion by Mr. Justice Holmes). Indeed, at common law, railroads were frequently held not liable for defects in *their own* sidetracks, let alone those of third-party industries. See 26 *Cyc.* 1127 (1905), 39 *Corpus Juris*, Master and Servant, § 508, p. 392 (1925), and 51 *Corpus Juris*, Railroads, § 1177, p. 1109 (1930).

The Ward Case. In a tortured effort to reconcile *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396 (1960), with the decisions below, respondent would have this Court believe that its square holding there—that the industry's maintenance of its own sidetrack did not make it the "agent" of the railroad for FELA purposes—is somehow related to whether Ward was an "employee" of the railroad (contrary to respondent's assertion, this was very much an open question) rather than to the latter's liability for the industry's negligence. Yet the word "agent" appears only once in the FELA, in the phrase which makes a railroad liable for the negligence of any of its "officers, *agents* or employees." Thus, this Court's holding can mean only that the railroad was not liable to plaintiff (assuming him to have been a railroad employee) for the industry's negligence, the precise issue herein involved.

No fluency of verbiage can obscure the factual parallel between *Ward* and the present case, the direct and head-on conflict between their respective holdings, or the cogency of Judge O'Sullivan's consideration of *Ward* in its controlling application to the case at bar.

The Statutes Requiring Switch Connections (RB 11-12). Respondent misconstrues the effect of these statutes (49 U. S. C. § 1[9] and West Virginia Code, 1955, § 2563) and the purpose for which they were cited. It is not true, as respondent states, that petitioner's carrier responsibilities end with the construction and operation of a switch, leaving intra-plant switching to the connecting industry. On the contrary, although its track *maintenance* ends at the switch, a railroad is legally obligated as a common carrier to spot cars on sidetracks like SUCO's once they are built by the industry. *U. S. v. American Sheet & Tinplate Co.*, 301 U. S. 402, 409-411 (1937). Thus, petitioner

could not legally require (and did not obtain) an indemnity agreement in this case as the price of its spotting services. Contrary to respondent's assertion, it follows that petitioner may well be without effective recourse if saddled with this new species of liability without fault. But more importantly, the authorities respecting petitioner's common carrier duties make clear that the "operational activities" rule of the *Sinkler* case does not extend to sidetrack maintenance, with the result that industry negligence in that regard cannot be imputed to petitioner.

The So-called "Policy" Question. Under this heading (RB 2-4), respondent describes the dire consequences to railroad employees which will ensue if the rule of vicarious liability is not extended to the facts of this case. Assuming that policy questions of this sort may properly be determined by this Court rather than by Congress, respondent's contentions in this regard distort both the realities of railroading and the law applicable to this case. Thus, respondent details the record evidence which is claimed to demonstrate petitioner's abdication of responsibility, and its lack of concern for the condition of the SUCO sidetrack, arguing that petitioner should not be permitted by this device to insulate itself from liability. The fallacy of this line of argument, however, is that that evidence relates to the railroad's *own* failure to exercise ordinary care, rather than to the question of its *vicarious* liability for the industry's fault. If a railroad, with total indifference to the safety of its employees, entirely washes its hands of responsibility for the condition of industrial sidetracks, can it reasonably be supposed that a Court or jury will absolve it of liability to an employee thereby injured? In this case, petitioner *concedes* that there was evidence from which a jury could conclude that *petitioner*

could have foreseen and prevented the accident. There are numerous FELA cases in which just such evidence has been found by juries to justify employee verdicts without the crutch of imputed negligence. See, *e.g.*: *Terminal R. Association of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. C. A. 8th, 1948); *Chesapeake & Ohio R. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4th, 1952); and *Atlantic Coast Line R. Co. v. Robertson*, 214 F. 2d 746 (C. A. 4th, 1954). Thus, there is no question here, as respondent implies, of denuding Ralph Payne of protection under the FELA. The inescapable question does, however, remain in the case at bar:—How can the comparative negligence of respondent's decedent, assessed by the jury at 13% of the total negligence, be properly measured under § 3 of the FELA (45 U. S. C. § 3) when the negligence of SUCO, without concern for its weight in the scale, is charged to petitioner by imputation, without opportunity for separate consideration or measurement?

CONCLUSION.

In view of the importance and volume of FELA litigation in the nation's courts, it would be a disservice to the profession to terminate this case with an enigmatic denial of certiorari, thus leaving the concept embraced by the district-judge majority below, revolutionary in the light of *Ward* and other federal appellate authorities, to hang as an unresolved question mark over future FELA trials. This Court should therefore admit this case for a full hearing on the merits.

Respectfully submitted,

ALEXANDER H. HADDEN,
DWIGHT B. BUSS,
Counsel for Petitioner.

Dated January 28, 1963.